A

Ablefoam Sdn Bhd v Khoo Kang Poey & Anor

B

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-62–01 OF 2013
ROZANA ALI JC
2 JUNE 2014

C

Civil Procedure — Parties — Locus standi — Whether proper party sued — Second defendant placing orders and taking delivery of products from plaintiff on behalf of Petty Enterprise — Claim by plaintiff for balance of payment for goods supplied — Whether second defendant actively running business of Petty Enterprise — Plaintiff under impression second defendant owner of Petty Enterprise — Plaintiff unable to and not obliged to find out actual proprietorship status of Petty Enterprise — Whether second defendant personally liable to plaintiff

D

Sale of Goods — Goods sold and delivered — Place payment — Second defendant placing orders and taking delivery of products from plaintiff on behalf of Petty Enterprise — Defective goods — Counterclaim by purchaser for purported damaged goods — Whether mere afterthought to avoid payment for goods — Whether defects proven — Whether second defendant liable to make payment for goods delivered — Sales of Goods Act s 32

E

F

The plaintiff was in the business of selling and supplying foam products. The second defendant who was the sole proprietor of Khoo Khang Poey Enterprise placed orders and took delivery of the foam products from the plaintiff on behalf of Petty Enterprise. Cheques were issued under the name of Khoo Khang Poey Enterprise to pay for the goods. The sole proprietor of Petty Enterprise was the father of the second defendant, Khoo Chin Tik, who had passed away. However Petty Enterprise was still registered under the name of Khoo Chin Tik. The plaintiff claimed for the balance of the payment for the goods supplied to the second defendant. The second defendant purported to return some of the goods to the plaintiff due to some defects but after inspection made there were no defects found. The defendants nevertheless counterclaimed for the defective goods and for damages for loss of income and loss of reputation.

G

H

Held, allowing the plaintiff's claim against the second defendant and dismissing the counterclaim:

I

(1) The plaintiff had a business deal with Petty Enterprise and the second defendant had been running Petty Enterprise as the representative of the estate of Khoo Chin Tik. The goods were sold and delivered to Petty

Enterprise and the second defendant had been placing orders, taking delivery and making payment to the plaintiff on behalf of Petty Enterprise since 2006. The second defendant had been actively running the business of Petty Enterprise and plaintiff was under the impression that he was the owner or operator of the said business (see para 14 & 22).

(2) The second defendant admitted that he made payments for Petty Enterprise using cheques of Khoo Khang Poey Enterprise. This admission clearly contradicted the defendants' assertion that he was not responsible to settle the outstanding amounts due and owing to the plaintiff. Therefore the second defendant was personally liable for the obligations incurred (see para 23).

(3) The plaintiff was in no position and had no obligation to find out the actual proprietorship status of Petty Enterprise. A search conducted by the plaintiff at the Registry of Businesses showed that Petty Enterprise was still an existing business registered in the name of Khoo Chin Tik. The defendants had not undertaken any legal procedures to either discontinue the business or make any legal transfers of the same to his own name or his company (see para 24).

(4) The plaintiff had supplied goods to second defendant who bought and took delivery of the goods on behalf of Petty Enterprise. Therefore, the defendants were required by law to make payments by virtue of s 32 of the Sales of Goods Act (see para 25).

(5) In relation to the defendants counterclaim, the defendants failed to prove their claim for the purported damaged goods. It was a clear afterthought by the defendant to avoid payment for the goods sold and delivered by the plaintiff to Petty Enterprise (see para 26).

(6) There was no evidence adduced that the first defendant was an administrator or executor of the estate of Khoo Chin Tik. Therefore, the first defendant was not liable and the plaintiff's claim against the first defendant was dismissed (see para 28).

[Bahasa Malaysia summary

Plaintif terlihat dalam perniagaan menjual dan membekalkan produk sabun. Defendan kedua yang merupakan pemilik tunggal Khoo Kang Poey Enterprise telah meletakkan pesanan dan mengambil penghantaran produk sabun daripada plaintif bagi pihak Petty Enterprise. Cek telah dikeluarkan di bawah nama Khoo Khang Poey Enterprise untuk membayar barang-barang. Pemilik tunggal Petty Enterprise adalah bapa kepada defendan kedua, Khoo Chin Tik, yang telah meninggal dunia. Walau bagaimanapun Petty Enterprise masih lagi didaftarkan di bawah nama Khoo Tik Chin. Plaintif menuntut bagi jumlah baki bayaran untuk barang yang dibekalkan kepada defendan kedua. Defendan kedua mengatakan telah mengembalikan beberapa barang-barang

kepada plaintif disebabkan oleh beberapa kecacatan tetapi selepas pemeriksaan dibuat tiada kecacatan didapati. Defendan-defendan namun membuat tuntutan balas untuk kecatatan barang-barang dan untuk ganti rugi bagi kehilangan pendapatan dan kehilangan reputasi. A

Diputuskan, membenarkan tuntutan plaintif terhadap defendan kedua dan menolak tuntutan balas: B

(1) Plaintif mempunyai perjanjian perniagaan dengan Petty Enterprise dan defendan kedua telah mengendalikan Petty Enterprise sebagai wakil kepada estet Khoo Chin Tik. Barangan telah dijual dan dihantar kepada Petty Enterprise dan defendan kedua telah membuat pesanan, mengambil penghantaran dan membuat bayaran kepada plaintif bagi pihak Petty Enterprise sejak tahun 2006. Defendan kedua telah secara aktif menjalankan perniagaan Petty Enterprise dan plaintif di bawah anggapan bahawa defendan kedua adalah pemilik atau pengendali perniagaan tersebut (lihat perenggan 14 & 22). C D

(2) Defendan kedua mengakui bahawa dia telah membuat bayaran untuk Petty Enterprise menggunakan cek Khoo Kang Poey Enterprise. Pengakuan ini jelas bercanggahan dengan hujahan defendan bahawa dia tidak bertanggungjawab untuk melunaskan hutang tertunggak yang perlu dibayar dan terhutang kepada plaintif. Oleh itu defendan kedua adalah bertanggungan secara peribadi bagi obligasi yang tertanggung (lihat perenggan 23). E

(3) Plaintif bukanlah di kedudukan dan tidak mempunyai tanggungjawab untuk mencari status pemilikan sebenar Petty Enterprise. Carian dibuat oleh plaintif di Pendaftaran Perniagaan menunjukkan bahawa Petty Enterprise masih lagi suatu perniagaan berdaftar atas nama Khoo Chin Tik. Defendan-defendan tidak mengambil apa-apa prosedur undang-undang sama ada mengakhiri perniagaan atau membuat apa-apa pemindahan undang-undang yang sama kepada namanya sendiri atau syarikatnya (lihat perenggan 24). F G

(4) Plaintif telah membekalkan barangan kepada defendan kedua yang telah membeli dan mengambil penghantaran bagi pihak Petty Enterprise. Oleh itu, defendan adalah dikehendakki oleh undang-undang untuk membuat bayaran menurut kuasa s 32 Akta Jualan Barang (lihat perenggan 25). H

(5) Berkaitan dengan tuntutan balas defendan, defendan gagal untuk membuktikan tuntutan mereka terhadap kerosakan barang yang diperkalakan. Ia adalah jelas merupakan sesuatu yang difikirkan kemudian oleh defendan untuk mengelak bayaran bagi barangan dijual dan dihantar oleh plaintif kepada Petty Enterprise (lihat perenggan 26). I

(6) Tiada keterangan yang dikemukakan bahawa defendan pertama

merupakan pentadbir atau wasi estet Khoo Chin Tik. Oleh itu, defendan pertama tidak bertanggungan dan tuntutan plaintif terhadap defendan pertama ditolak (lihat perenggan).]

Notes

For a case on place of payment, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) para 793.

For cases on locus standi, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6809–6339.

Cases referred to

Bank Bumiputera Malaysia Berhad v Yap Kiow Mai & Ors [1973] 2 MLJ 104; [1973] 1 LNS 6, HC (refd)

Chew Hock San & Ors v Connaught Housing Development Sdn Bhd [1985] 1 MLJ 350, FC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Sales of Goods Act 1957 s 32

Arief Emran Ariffin (Wong & Partners) for the plaintiff.

Ng Chin Chan (Jayadeep Hari & Jamil) for the defendant.

Rozana Ali JC:

INTRODUCTION

[1] The plaintiff's claim against the defendants for good sold and delivered of the outstanding payment of RM507,274.02 which is due and owing to the plaintiff for the supply of foam products to Petty Enterprise plus interest and cost.

[2] The defendants are counterclaiming for the defective goods for a sum of RM275,280 due to costs and expenses allegedly incurred in dealing with their customers' complaints on the goods. The defendant also claimed damages amounting to RM30,000 per month for loss of income and loss of reputation.

BACKGROUND FACTS

[3] The plaintiff, Ablefoam Sdn Bhd is a company that operates in the business of selling and supplying foam products which are commonly used for upholstery of furniture, bedding, packaging, customer foam items and a variety of industrial foam.

[4] The second defendant who is the sole proprietor of Khoo Khang Poey Enterprise placed orders, took delivery of the foam products on behalf of Petty Enterprise and issued cheques under the name of Khoo Khang Poey Enterprise to satisfy payments for some of the goods sold and supplied by the plaintiff to Petty Enterprise between the periods of March 2011–September 2011. The sole proprietor of Petty Enterprise was the father of the second defendant, Khoo Chin Tik, who passed away around 14 April 2005. However Petty Enterprise was still registered under the name of Khoo Chin Tik.

[5] The plaintiff claimed that they had supplied the goods to the second defendant but the payments for the goods amounting to RM507,274.02 was not made by the defendants. The second defendant purported to return some of the goods to the plaintiff due to some defects but after inspection made there were no defects found. Despite of that the plaintiff still issued a credit note for the sum of RM5,013.53 but insisted that the remaining sum of RM507,274.02 remains due and payable. Subsequently, the plaintiff through its solicitors, issued a letter of demand dated 14 September 2012 but still to date did not received the outstanding payments from the defendants.

ISSUES

[6] Both parties agreed that there are six issues to be determined. The issues are as follows:

(a) whether the defendants or any one of them were responsible for the payment of the goods sold and delivered;

(b) whether the second defendant represented himself as an associate and/or a person responsible for Petty Enterprise;

(c) whether Petty Enterprise was used as a vehicle and the real dealings were between the second defendant and the plaintiff;

(d) whether the second defendant made payments for the goods using his personal account and/or by cheques issued by various entities;

(e) whether the second defendant continued the business of Petty Enterprise and/or continued to use the name of Petty Enterprise after the death of Khoo Chin Tik; and

(f) whether the goods returned as documented in purchase return No 10034 dated 11 July 2012, or any goods supplied by the plaintiff were defective as alleged by the second defendant and caused the defendants or any one of them to suffer losses.

THE PLAINTIFF'S SUBMISSION

[7] The plaintiff submitted that the defendant is personally liable for the payments due and owing to the plaintiff for goods sold and delivered to Petty Enterprise as he has been actively involved in conducting the business and dealings of Petty Enterprise after the demise of his father, Khoo Chin Tik and should bear the personal liability of the said proprietorship. The plaintiff relied on the case of *Bank Bumiputera Malaysia Berhad v Yap Kiow Mai & Ors* [1973] 2 MLJ 104; [1973] 1 LNS 6, that the principle in this case dictates that the executors and trustees are personally liable for the contract they had executed with the plaintiff upon the death of the sole proprietor.

[8] The defendant had held himself out to be the person responsible for Petty Enterprise's dealings with the plaintiff. The plaintiff had established the burden of proof against the defendant on a balance of probabilities to establish that the defendant's involvement in the business of Petty Enterprise warrants his personal liability to discharge the outstanding sums of RM507,274.02 due and owing to the plaintiff. There were evidences that various cheques were issued under the name of Khoo Khang Poey Enterprise, a sole proprietorship belonging to the second defendant, for the payment of the goods.

[9] The second defendant during his cross examination admitted that the accounts belonging to Petty Enterprise had not been managed and continued upon the demise of his father, Khoo Chin Tik. It was also submitted that the financial dealings of Petty Enterprise have been managed by the second defendant and that he has been utilising his own account and the accounts belonging to Khoo Khang Poey Enterprise to make payments to the plaintiff for goods supplied and delivered to Petty Enterprise. The defendants in fact utilised monies from his own account or the accounts of Khoo Khang Poey Enterprise to finance the goods sold and delivered by the plaintiff to Petty Enterprise. Therefore the payments made between the years 2005–2011 did not come from the accounts of Petty Enterprise and had instead come from the defendants.

[10] The plaintiff also submitted that the second defendant has also admitted that his Khoo Khang Poey Enterprise has taken delivery of the goods from Petty Enterprise and had not made payments for the same. This fact coupled with evidence of payments being made by the defendants to the plaintiff for goods sold and delivered to Petty Enterprise and therefore it leads to the conclusion that the defendants is to be held responsible in making payments for the same.

[11] Since the second defendant had not discontinued and/or deregistered Petty Enterprise upon the demise of his father and continues to represent

himself as an associate and/or person responsible for Petty Enterprise, it shows that the second defendant was responsible for its running of Petty Enterprise. Therefore, it cannot be denied that the second defendant has represented himself to be the person responsible for Petty Enterprise.

[12] The plaintiff contended that Petty Enterprise was used by the defendant as a vehicle or conduit for the second defendant to carry out his business whether on his own or for the benefit of his sole proprietorship, Khoo Khang Poey Enterprise.

THE DEFENDANT'S SUBMISSION

[13] The goods was sold and delivered to Petty Enterprise and not the second defendant. The second defendant is not the owner of Petty Enterprise and should not be responsible for the payment of the goods sold and delivered.

[14] The second defendant has been running Petty Enterprise as the representative of the estate of his father, the owner of Petty Enterprise. The plaintiff is well aware and knew of the fact that the owner of Petty Enterprise has passed away on 14 April 2005 and the second defendant is only a representative. In addition, PW1 admitted that her husband and son might know of the fact that the owner of Petty Enterprise had died. The defendant insisted that it is the plaintiff's responsibility and to make an effort to find out about the death of his father and since the plaintiff failed to take steps or effort, they cannot now be claiming from the second defendant.

[15] The defendants also submitted that the plaintiff were informed and knew about the death of the owner of Petty Enterprise since they have been dealing with each other for business purposes before 2006 and had been receiving payment from the second defendant's company, Khoo Kang Poey Enterprise and not from Petty Enterprise itself. This shows that the plaintiff was willing to deal with Petty Enterprise knowing that the owner had died and did not bother to change the deal to the second defendant's company knowing that he was paying on behalf of Petty Enterprise. Despite the fact that the second defendant had been paying on behalf of Petty Enterprise, it only point to a conclusion that the second defendant had never represented to the plaintiff that he will personally liable for the goods sold and delivered to Petty Enterprise.

[16] PW1 admitted that the second defendant had never told plaintiff that he will be personally responsible to pay for goods delivered to Petty Enterprise and assumed that the second defendant was the person responsible for Petty Enterprise because he was the person dealing on behalf of Petty Enterprise and has been paying for the goods delivered to Petty Enterprise.

[17] It was also submitted again that just because the second defendant was paying the previous goods delivered to Petty Enterprise it does not make him the person who is responsible for all the goods sold and delivered to Petty Enterprise. In fact whatever representation made by the second defendant on behalf of Petty Enterprise should only bind Petty Enterprise and not the second defendant personally.

[18] Relying on the *Chew Hock San & Ors v Connaught Housing Development Sdn Bhd* [1985] 1 MLJ 350 the defendant submitted that Petty Enterprise would be liable for whatever representation or conduct made by its agent and not the agent personally. Hence, the second defendant here should not be made liable for whatever representation or conduct made to the plaintiff on behalf of Petty Enterprise as he was merely agent of Petty Enterprise. The second defendant and Petty Enterprise are not one and same as admitted by PW1 during cross-examination. Furthermore the plaintiff also has never demanded for payment from the second defendant personally and this shows that they were aware that the second defendant and Petty Enterprise are separate entities.

[19] The defendant invoked s 114(g) of the Evidence Act 1950 on the plaintiff for the failure to call the PW1's husband and son as witnesses by the plaintiff because both of them have personal knowledge that they knew that there were complaints reported by the second defendant to the plaintiff with regards to the goods sold and delivered to Petty Enterprise compared to PW1 who does not have personal knowledge of what had happened prior to the suit because she was not the person who was dealing with the second defendant. Hence adverse inference should be drawn against the plaintiff.

[20] The defendants and Petty Enterprise claimed damages for defective goods supplied by the plaintiff including transportation costs and repairs for RM275,280. In addition the defendant also claimed for loss of income RM30,000 per month (to be assessed) and for loss of reputation over defective goods.

FINDINGS OF THE COURT

[21] Having heard the evidences of the witnesses before me and submissions of learned counsel for both parties on the facts, law and evidence and after having given much consideration, I, on the balance of probabilities, take the view that the plaintiff's claims against the second defendant be allowed. My reasons, inter alia, are as follows.

[22] It was clear from the evidence that the plaintiff has a business deal with Petty Enterprise and the second defendant has been running Petty Enterprise as

the representative of the estate of his father, Khoo Chin Tik, the owner of the enterprise. It is not denied that the goods were sold and delivered to Petty Enterprise and the second defendant has been placing orders, took delivery and making payment to the plaintiff on behalf of Petty Enterprise since 2006. The second defendant had been actively running the business of Petty Enterprise and plaintiff was under the impression that he was the owner of operator of the said business. Even though the owner of Petty Enterprises vis a vis, his father has passed away, the second defendant continues and manages the said business using his own personal account and/or the accounts of Khoo Khang Puey Enterprise.

[23] Furthermore, it should be noted that the second defendant himself has clearly admitted in the cross-examination that he made payments to Petty Enterprise using cheques of Khoo Khang Poey Enterprise. This admission clearly contradicts the defendants' assertion that he is not responsible to settle the outstanding amounts due and owing to the plaintiff. Therefore the second defendant is personally liable for the obligations incurred which led the plaintiff to believe that their business dealing with the second defendant operating on behalf of Petty Enterprise.

[24] At the same time, the plaintiff was in no position and has no obligation to find out the actual proprietorship status, who is the owner of Petty Enterprise and when is the date of his death. The court accepted PW1's explanation because it was clear and consistent in denying her knowledge of the actual proprietorship status of Petty Enterprise. However a search conducted by the plaintiff at the registry of businesses shows that Petty Enterprise is still an existing business registered in the name of Khoo Chin Tik. It is incumbent on the second defendant to affect a formal transfer of the proprietorship and establishing to the world at large, including the plaintiff, that they were running the business of Petty Enterprise notwithstanding the demise of his father who is the actual sole proprietor of Petty Enterprise. The defendants had not undertaken any legal procedures to either discontinue the business or make any legal transfers of the same to his own name or his company. Even if the death of the second defendant's father was made known to the plaintiff, it is not their obligation or legal responsibility to change the status of proprietorship of Petty Enterprise. It follows that even if the death of the second defendant's father was also made known to PW1's husband and son, it does not affect the plaintiff's claim. Therefore the court ruled that 114(g) of the Evidence Act 1950 cannot be invoked on the plaintiff for not calling PW1's husband and son as witnesses.

[25] In this claim, the evidence shows that between the periods of March 2011–September 2011, the plaintiff had supplied goods to second defendant who bought and took delivery of the goods on behalf of Petty Enterprise

amounting RM512,287.55 as at 10 September 2011 (refer statement of account for the defendant p 313-B) whereby the plaintiff demanded the said amount through a letter of demand dated 9 November 2011. Therefore, the defendants are required by law to make payments by virtue of s 32 of the Sales of Goods Act 1957 that stipulates:

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the, seller shall he ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

[26] The second defendant through his solicitor counterclaim losses due to damaged goods for a sum of RM545,280 vide the letter dated 2 September 2011. By the letter dated 21 September 2012, the defendants have acknowledge that both parties had previously discussed with regard to the settlement of this matter and as agreed between both parties that the second defendant to return the said goods as stated in purchase return No 10034 dated 11 July 2012. The plaintiff also acknowledged the returned of the goods via the letter dated 8 August 2012 and indicated that the goods were in good condition and there were no defects. The plaintiff then issued a credit note No 00218 for the value of the goods worth RM5,013.53. The defendants was also aware of the demand of the outstanding sum of RM507,274.02 (RM512,287.55 – RM5,013.53) by the plaintiff through the letter dated 14 September 2012. The defendant also has requested the plaintiff for the statement of account owed by the defendant. Therefore in relation to the defendants counterclaim, the court on the balance of probabilities finds that the defendants failed to prove their claim for the purported damaged goods. The issue of the damaged good had been settled and agreed between both parties as evidenced in the letter dated 21 September 2012. Since the defendant has not raise the issue of counterclaim after the plaintiff letter dated 3 October 2012, the court is of the opinion that it is a clear afterthought by the defendant to avoid payment for the good sold and delivered by the plaintiff to Petty Enterprise.

[27] The plaintiff by the letter dated 3 October 2012 in response to the defendants' letter dated 21 September 2012, stated that a sum of RM507,274.02 is still due and owing and demanded the said sum to be paid. The defendants as to date failed to pay the said sum. It is my finding that the plaintiff has established their case that the second defendant is personally liable for the sum RM507,274.03 for the goods sold and delivered because he had held himself out to be Petty Enterprise.

[28] As to the first defendant, there is no evidence adduced that the first defendant is an administrator or executor of the estate of the deceased, Khoo Chin Tik. Therefore, I find that the first defendant is not liable and the plaintiff claimed against the first defendant is dismissed.

[29] For reasons stated above, I allowed the plaintiff's claim:

(a) for the sum of RM507,274.03;

(b) interest at the rate of 5%pa for the judgement sum from 3 January 2013 to the date of realisation;

(c) counterclaim by the defendant is dismissed; and

(d) cost of RM20,000 to be paid by the second defendant to the plaintiff.

[30] I hereby order so.

Plaintiff's claim against second defendant allowed and counterclaim dismissed.

Reported by Kanesh Sundrum